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Supreme Court, U.S.
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No. 03-1597

IN THE

Supreme Court of the United States

GARY D. LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether § 2 of the Voting Rights Act of 1965, which prohibits any voting qualification or prerequisite to voting that results in the denial of voting rights on account of race, can be applied to the Washington state laws that deny the right to vote to persons convicted of a felony.

PARTIES TO THE PROCEEDING

The Petition for a Writ of Certiorari ("Pet.") correctly identifies the parties to the proceeding below. Respondents wish to inform the Court that, while Respondent Muhammad Shabazz Farrakhan has been referred to by that name consistently throughout the course of these proceedings, his name was not changed to Muhammad Shabazz Farrakhan through formal legal proceedings. Mr. Farrakhan's legal name is Ernest Walker.

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COUNTER-STATEMENT OF THE CASE

This case concerns the scope of § 2 of the Voting Rights Act of 1965 ("VRA" or "Voting Rights Act"), and whether § 2 provides a basis for Respondents to challenge Washington's felon disfranchisement scheme, which denies suffrage to persons upon conviction of a felony.

A. Felon Disfranchisement In Washington State

Washington's statutory scheme for felon disfranchisement is rooted in Article VI, § 3 of the Washington Constitution, App. 93a.[1] The process for revocation of the offender's right to vote is administrative in nature; it is a collateral consequence of "convicted felon" status, not a part of the adjudication of guilt and sentencing of the offender. Upon the offender's conviction, notice is sent to the county auditor who revokes the offender's voter registration, if any. *See* Wash. Rev. Code § 10.64.021, App. 99a (convictions in state court); 42 U.S.C. § 1973gg-6(g) (convictions in federal court). Because loss of the right to vote is based entirely upon the offender's status as a felon, the specific type or degree of the crime for which the offender was convicted plays no role in the automatic revocation of the right to vote. The offender may later seek to reinstate the right to vote through a statutory process. *See* Wash. Rev. Code § 9.94A.637, App. 94a (determinate sentences); *id.* § 9.96.050, App. 97a (indeterminate sentences); *id.* § 9.94A.875 (clemency and pardons board).

B. Procedural History

Respondents in this case are currently denied the right to vote in Washington because they each were convicted of a felony. Muhammad Shabazz Farrakhan (also known as Ernest Walker, *see supra* p. ii), Al Kareem Shadeed, and Marcus Price

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[1] Citations in this format are to the Appendix to the Petition for a Writ of Certiorari.

are African-American; Clifton Briceno and Timothy Schaaf are Native-American; and Ramon Barrientes is Hispanic-American. None of the Respondents is currently eligible for restoration of voting rights under Washington's statutory restoration procedure.

Respondents filed this action in the United States District Court for the Eastern District of Washington, challenging Washington's felon disfranchisement scheme under the Voting Rights Act and the First, Fourth, Fifth, Sixth, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Respondents argued that felon disfranchisement denies racial minorities the right to vote on the basis of race and has the effect of diluting racial minority voting strength.

Appellants moved to dismiss Respondents' claims pursuant to Fed. R. Civ. P. 12(b)(6). The district court sustained Respondents' claims of vote denial under the Voting Rights Act but dismissed their vote dilution claim under the Act and their Constitutional claims. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1315 (E.D. Wash. 1997), App. 67a, 90a.

Respondents subsequently filed a motion for summary judgment. Respondents presented evidence to support a "totality of circumstances" argument, as required by § 2 of the Voting Rights Act when challenging the racial effects of a voting practice, including the following: evidence of disparities in the treatment of minorities in the criminal justice system; a history of race discrimination in the state of Washington; and the tenuous public policy rationale for felon disfranchisement. Petitioners responded with a cross-motion for summary judgment, arguing that felon disfranchisement is constitutionally permissible, that the VRA was not intended to prohibit felon disfranchisement, and that, even if the VRA applied to felon disfranchisement, Respondents did not present sufficient evidence to satisfy the totality of circumstances analysis.

In its ruling on the cross-motions for summary judgment, the district court found that "the [felon] disenfranchisement provision clearly has a disproportionate impact on racial minorities . . . ." *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *9 (E.D. Wash. Dec. 1, 2000), App. 54a, 59a, *aff'd in part and rev'd in part sub nom. Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), and that Respondents' "evidence of discrimination within the criminal justice system . . . is compelling," *id.* at *14, App. 62a. Despite these findings, the district court found that this evidence could not be considered within the VRA's totality of circumstances analysis because such evidence creates a "causal chain [that] runs, if at all, to a factor outside of the challenged voting mechanism." *Id.* at *10, App. 59a. After disregarding evidence of disparities within the criminal justice system, the district court held that Respondents failed to provide evidence satisfying the totality of circumstances analysis and granted summary judgment in favor of Petitioners. *Id.* at *18, App. 64a.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in failing to consider disparities in Washington's criminal justice system in the context of the VRA's totality of circumstances analysis. The court of appeals agreed, holding that the totality of circumstances analysis "requires the court to consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process," *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003), App. 1a, 9a. The court of appeals further held that in determining whether Washington's felon disfranchisement provisions produce a discriminatory result, a court must consider factors external to the challenged voting mechanism as well as voting practices themselves. To do otherwise, the court stated, would "effectively read an intent

requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2 [of the VRA]." *Id.*, 338 F.3d at 1019, App. 19a. Because the district court found that the Respondents' evidence was "compelling," the court of appeals posited that, "had the district court properly interpreted the causation requirement under the totality of the circumstances test instead of applying its novel 'by itself' causation standard, the court might have reached a different conclusion." *Id.*, 338 F.3d at 1020, App. 22a (footnote omitted). Accordingly, the court of appeals reversed and remanded the case to the district court to evaluate the record evidence in light of the correct analysis. *Id.*, 338 F.3d at 1020, App. 23a.

The court of appeals panel explicitly agreed with the district court that the VRA covered felon disfranchisement laws:

> As a preliminary matter, we agree with the district court that Plaintiffs' claim of vote denial is cognizable under Section 2 of the VRA. Felon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA. 42 U.S.C. § 1973. Indeed, the Supreme Court has made clear that states cannot use felon disenfranchisement as a tool to discriminate on the basis of race, *see Hunter v. Underwood*, 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (holding that where racial bias motivated its original enactment, a facially neutral felon disenfranchisement law violated the Equal Protection Clause), and Congress specifically amended the VRA to ensure that, "in the context of all the circumstances in the jurisdiction in question," any disparate racial impact of facially neutral voting requirements did not result from racial discrimination, Senate Report at 27; *see also Chisom v. Roemer*, 501 U.S. at 394 & n. 21, 111 S.Ct. 2354.

> Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices. Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, *Richardson v. Ramirez*, 418 U.S. 24, 54-55, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress.

338 F.3d at 1016, App. 13a-14a (footnote omitted).

The panel did not discuss the "plain statement" rule because Petitioners did not rely upon it in their brief to the court of appeals. The brief discussed the legislative history of the VRA, which Petitioners said "clearly demonstrates that [the statute] was never intended to extend the voting rights of convicted felons." Brief for Appellees, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (No. 01-35032), at 13. Petitioners added in a footnote that "[t]he same conclusion would follow from the application of the 'plain statement rule.' Federal courts apply the 'plain statement rule' as a rule of statutory construction to limit the involvement of the federal courts in traditional state matters absent clear Congressional intent to the contrary . . . ." *Id.* at 13 n.3. Petitioners did not discuss, in the balance of that short footnote, the circumstances in which this Court has applied the "plain statement rule," *i.e.*, when a statute is ambiguous and unclear, see *infra* § IV.A., much less ask the court of appeals to affirm the district court's judgment in their favor on these alternate grounds.

The court of appeals rejected Petitioners' subsequent petition for rehearing and rehearing *en banc*. Dissenting from that action, Judge Kozinski wrote that "the district court's

decision granting summary judgment was correct, even if for the wrong reasons," *Farrakhan v. Washington*, 359 F.3d 1116, 1119 (9th Cir. 2004), App. 37a. He argued that the interpretation of the VRA supported by the majority conflicted with recent decisions of this Court and the United States Constitution. 359 F.3d at 1124, App. 46a-47a.

REASONS FOR DENYING THE WRIT

Introduction

The conflict between the decision below and a single contrary appellate ruling with precedential weight does not warrant this Court's exercise of its discretionary certiorari jurisdiction. Given the benefits of further litigation in the lower courts and the absence of need for immediate review (especially where the decision below correctly applies a provision of federal law), this Court should deny the petition and permit the case to be litigated to final judgment, at which time both the necessity, if any, of deciding the federal question and the full factual context for doing so will be clear. Because the "plain statement" issue on which Petitioners centrally rely before this Court, see Pet. at 17-20, was neither raised nor discussed below, Petitioners' claim of conflict among the circuits is overstated.

Moreover, whatever conflict may exist is, at best, one of theory because the decisions that have addressed the question of the VRA's application to felon disfranchisement laws have not yet had any practical effect upon state law since they have not yet resulted in final judgments. Thus, Petitioners now seek interlocutory review of a federal question that might be unnecessary if the case were permitted to proceed to final judgment. Finally, the Ninth Circuit correctly decided that the VRA applies to felon disenfranchisement laws — a decision

supported by the text, legislative history, and even the "plain statement" analysis of the Voting Rights Act.

I

Certiorari Should Be Denied Because Petitioners Failed To Raise Their Plain Statement Argument At The Appellate Level.

This Court has ruled that it "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S 257, 259 (1987) (*citing California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958) (noting that "[o]nly in exceptional cases will this Court review a question not raised in the court below").

Petitioners did not raise the "plain statement" argument before the Ninth Circuit,[2] either on direct appeal, see *supra* p. 5, or in their request for rehearing and rehearing *en banc*.[3]

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[2] Petitioners raised the "plain statement" argument before the district court, which held that the plain statement rule does not apply to the VRA. *Farrakhan v. Locke*, 987 F. Supp. at 1308-09, App. 73a-74a.

[3]The issues Petitioners raised for *en banc* review were stated as follows:

(1) "The panel decision conflicts with Salt River by allowing this Voting Rights Act challenge to proceed on a record demonstrating nothing more that statistical disparity[,]" and

Consequently, as stated in the Petition, "the Ninth Circuit did not discuss the application of the plain statement rule to the Voting Rights Act." Pet. at 9. Petitioners failed to inform this Court, however, that they had not urged the court below to uphold the grant of summary judgment in their favor on the basis of the plain statement rule.

Where, as here, an issue has not been decided by the court of appeals, certiorari review of that issue is routinely denied. *See, e.g., Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (declining to address whether application of the ADA to state prisons is a constitutional exercise of Congress' power under the Commerce Clause or § 5 of the Fourteenth Amendment because the issue was not addressed by the lower courts); *Adickes*, 398 U.S. at 147 n.2 (1970) (declining to hear petitioner's challenge to the Civil Rights Cases because an "examination of the record show[ed] that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals"); *Husty v. United States*, 282 U.S. at 701-02 ("[W]e do not consider [the rulings on the evidence], since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."). The absence of any mention of the plain statement rule in the issues on appeal and Petitioners' failure to avail themselves of every opportunity to raise this issue in the court of appeals as a basis for affirmance militate strongly in favor of denying certiorari.[4]

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(2) "The panel decision similarly conflicts with the decision of the Sixth Circuit in *Wesley v. Collins*, which concluded that statistical disparity in felon disfranchisement does not establish a violation of the Voting Rights Act."

Petition for Rehearing and Petition for Rehearing *En Banc*, *Farrakhan v. Washington*, 338 F.3d 1009 (No. 01-35032), at 3.

[4] This Court used similar reasoning in *Adams v. Robertson*, 520 U.S. 83 (1997) in dismissing the case, holding that certiorari was

II

Petitioners Overstate The Extent Of Any Circuit Conflict; This Court Has Denied Certiorari Where The Alleged Conflict Was More Developed Than That Presented Here.

Only three courts of appeals have issued opinions of precedential effect concerning the VRA's application to felon disfranchisement laws.[5] *See Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), App. 1a; *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). Only two of those opinions squarely confront the question whether the Voting Rights Act applies to felon disfranchisement: *Muntaqim*, 366 F.3d at 115 (holding that the VRA does not apply to felon disfranchisement); *Farrakhan*, 338 F.3d at 1016, App. 13a-14a (holding the reverse). As the Second Circuit observed in *Muntaqim*, the Sixth and Eleventh Circuits have assumed without expressly deciding that the Voting Rights Act applies to felon disfranchisement. *Muntaqim*, 366 F.3d at 112 & n.12 (*citing Wesley*, 791 F.2d at

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improvidently granted since the federal constitutional argument was never presented to the state supreme court. *Id.* at 85. (The Court explicitly noted that it would reach this result whether it considered the requirement that the argument be fairly presented to the state court to be jurisdictional or to be prudential in nature. *Id.* at 90.) Although the petitioners in *Adams* devoted two pages of their brief in the state court to the discussion of a case relevant to the constitutional argument, this Court found the discussion "unrelated" and "insufficient" to meet the requirement. *Id.* at 88.

[5] "Because the ten members of the Court who decided *Baker* split evenly on its disposition, the opinions in that case have no precedential effect, and the decision of the District Court was left undisturbed." *Muntaqim v. Coombe*, 366 F.3d 102, 107-08 (2d Cir. 2004) (discussing *Baker v. Pataki*, 85 F.3d 919, 921 n.2 (2d Cir. 1996)).

1259-61; *Johnson v. Bush*, 353 F.3d 1287, 1303-04 (11th Cir. 2003)). The Eleventh Circuit panel opinion has since been vacated by the grant of rehearing *en banc*, *Johnson v. Bush*, 2004 WL 1609101 (11th Cir. July 20, 2004) (No. 02-14469).

Further, of the two courts of appeals that have squarely decided whether the VRA applies to felon disfranchisement laws, only the Second Circuit in *Muntaqim* has applied the "plain statement" rule, 366 F.3d at 104 (applying "plain statement" rule on the grounds that construing the Voting Rights Act to cover felon disfranchisement would alter the balance of power between the federal and state governments), making it the only court of appeals to adopt this approach. The Ninth Circuit below, in deciding this question, referred to the plain language of the VRA, holding that "[f]elon disfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA." *Farrakhan*, 338 F.3d at 1016, App. 13a (citation omitted) (emphasis in original). Thus, while the Second Circuit and the court below ultimately reached different results, their rationales are not directly in conflict to an extent that warrants this Court's intervention in this developing area of the law.

This Court has denied petitions for writs of certiorari in similar situations, even where the conflict among the courts was more fully developed. Recently, for example, in *McNeil v. Legislative Apportionment Comm'n of N.J.*, 124 S. Ct. 1068 (2004), this Court denied certiorari despite the existence of a split between the Sixth, Seventh, Ninth, and Eleventh Circuits, and a panel of the Fifth Circuit, all of which had held that influence-dilution claims were not cognizable under the Voting Rights Act, and the First Circuit and a different panel of the Fifth Circuit, which held that such claims were viable. *See* Petition for a Writ of Certiorari, *McNeil v. Legislative Apportionment Comm'n of N.J.* (No. 03-652), at 9-10.

Denying certiorari in this context allows this Court to delay until the issue matures through study and is further developed by lower courts. *E.g.*, *Durden v. California*, 531 U.S. 1184 (2001) (Souter, J., dissenting from denial of certiorari) ("[R]ulings by other courts . . . would be valuable to us in any examination of the issue we might ultimately give it."); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (observing that denial of certiorari gives state and federal courts the opportunity to study the issue further); *see also McCray v. New York*, 461 U.S. 961, 963 (1983) (Opinion of Stevens, J., joined by Blackmun & Powell, JJ., respecting the denial of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."); *cf. Bunting v. Mellen*, 124 S. Ct. 1750, 1752 (2004) (opinion of Stevens, Ginsburg & Breyer, JJ.) (suggesting that certiorari was properly denied where apparent conflict could be explained by factual differences between the case at bar and facts in "conflicting" cases).

For these reasons, the instant case is not "certworthy" and Petitioners' request for review should be denied.

III

The Judgment Below Is Interlocutory And Review At This Stage Would Be Premature.

The Ninth Circuit Court of Appeals "remand[ed] this claim . . . for further proceedings [and] any requisite factual findings following an appropriate evidentiary hearing." *Farrakhan v. Washington*, 338 F.3d at 1020, App. 23a. The interlocutory nature of the court of appeals' ruling weighs against present review by this court. *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328

(1967) (*per curiam*) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

As stated above, the Ninth Circuit never addressed the merits of the § 2 claim in this case; it merely held that the district court erred in excluding evidence of discrimination in Washington's criminal process from consideration in the "totality of the circumstances" inquiry on summary judgment: "We recognize [that Plaintiffs' § 2 claim] is a difficult issue and that it requires a searching inquiry into all factors that bear on Plaintiffs' claim. We, however, express no opinion on the merits of Plaintiffs' claim and leave that determination to the district court in the first instance." *Farrakhan v. Washington*, 338 F.3d at 1020, App. 23a. Whether the VRA can apply at all to felon disfranchisement statutes should not be decided on a limited record that does not reflect the ultimate practical effect its application in Washington. Given the limited record before this Court, and the limited number of decisions on point, this Court should decline review of this issue in order to allow it to develop fully through further lower court consideration.

IV

The Court Below Decided Correctly That The VRA Applies To Felon Disfranchisement Laws And Further Review Is Unnecessary.

The Ninth Circuit's holding that a felon disfranchisement challenge is cognizable under § 2 of the VRA is legally sound and comports with the rules of statutory construction articulated by this Court.

A. The Plain Meaning Of § 2 Is Unambiguous On Its Face.

Section 2 of the Voting Rights Act expressly prohibits any "voting qualification or prerequisite to voting" that is applied "in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). As a matter of strict textual interpretation, it is indisputable that felon disfranchisement laws fall within the purview of § 2 as a voting "qualification" or "prerequisite." *Id.* The ordinary meaning of the key terms in the provision — "voting qualification or prerequisite," "any citizen" and "on account of race or color" — supports this reading of the statute.[6] None of these terms or phrases is elusive or confusing

[6] For example, the dictionary definition of "qualification" is "a condition or standard that must be complied with (as for the attainment of a privilege)." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 963 (1990). Felon disfranchisement laws, which condition voting on being free of a felony conviction, are a "qualification" to voting as that term is defined. Similarly, the dictionary definition of "prerequisite" is "something that is necessary to an end or to the carrying out of a function." *Id.* at 929. The requirement that a person not be convicted of or under state custody for a felony in order to vote is clearly a "prerequisite" to voting. Moreover, as citizens of the United States, Respondents clearly have standing under § 2, which prohibits the abridgement of "the right of any citizen . . . to vote on account of race or color," 42 U.S.C. § 1973(a) (emphasis added). Indeed, persons with felony convictions fall under the definition "any citizen" within the meaning of the statute as they never cease to be citizens during any stages of state custody, including incarceration. Finally, felon disfranchisement laws, like any other voting qualification or prerequisite, might result in the denial of the right to vote "on account," for the sake, by reason, or because of race or color. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (2002) (defining the term "on account of").

in their meaning; nor are they subject to multiple reasonable interpretations.

As is well articulated by this Court, in interpreting the scope of a statute, courts must first discern the statute's plain meaning. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991). If the statute's meaning is unambiguous, as is the language of § 2, the court should apply the law according to its terms. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (holding that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Indeed, federal courts routinely interpret § 2 on the basis of its plain meaning. *See, e.g., Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (relying on the "plain language of Section 2 of the Voting Rights Act" to demonstrate that the provision applies only to citizens); *Nixon v. Kent County*, 76 F.3d 1381, 1386-87 (6th Cir. 1996) (finding that "[n]othing in the clear, unambiguous language of § 2 allows or even recognizes the application of the Voting Rights Act to coalitions . . . ."); *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1563 (11th Cir. 1996) (holding that the "plain language of § 2 . . . requires a showing of discriminatory results" even where there is discriminatory intent); *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003) ("Our discussion begins, as it must, with the consideration of the plain meaning of [Section 2 of the VRA]."); *Holley v. City of Roanoke*, 162 F. Supp. 2d 1335, 1340 (M.D. Ala. 2001) ("A plain reading of [Section 2 of the VRA] clearly demonstrates its applicability only to those systems in which officials are chosen through an election."); *France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999) ("The plain language of the Voting Rights Act makes it clear that it is only concerned with the voting practices

of citizens."); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1568-69 (N.D. Ill. 1988) (holding that "[b]y its very terms, the [Voting Rights] Act extends only to mechanisms involved in the election of representatives" and not the appointment of judges).

The legislative history of an unambiguous statute is not considered by the court for purposes of interpreting the meaning of the statute. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (courts will "not resort to legislative history to cloud a statutory text that is clear."); *Schick v. Schmutz (In re Venture Mortgage Fund, L.P.)*, 282 F.3d 185, 188 (2d Cir. 2002) ("'Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.'") (quoting *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999)).

Moreover, even if a statute is subject to a construction that alters the balance between federal and state powers, only where the statute is ambiguous must courts find a plain statement from Congress that this result was specifically intended before adopting that construction. *See, e.g., Salinas v. United States*, 522 U.S. 52, 60 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) (the plain statement rule applies only to ambiguous statutes).

Petitioners ignore entirely the plain meaning of § 2, which on its face clearly encompasses any voting disqualification, including one based on a felony conviction. Instead, the State asks this Court to disregard well-settled canons of statutory interpretation, which require an analysis of § 2's plain meaning, and to apply the plain statement rule, which the court below appropriately did not reach. The State relies on general principles of federalism and the legislative history of the VRA as a whole — avoiding the specific text and legislative history of §2 — to argue that the plain statement rule applies. *Id.*

This blatant misapplication of the clear tenets of statutory construction should not be countenanced by this Court. Indeed, not only has this Court never elected to apply the plain statement rule to the VRA, it affirmatively declined to apply it to Section 2, prior to the 1982 amendments to the statute. *See City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *see also Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) ("[W]e tacitly rejected a 'plain statement' rule as applied to the unamended § 2 in *City of Rome v. United States* . . . ."). And, as Petitioners concede, "Congress did not change the scope of the coverage of the VRA in 1982. *Chisom v. Roemer*, 501 U.S. 380, 384 (1980 [*sic*: 1991])." Pet. at 20.

B. Even Assuming The Plain Statement Rule Applies, The Ninth Circuit Was Correct In Holding That § 2 Covers Washington's Felon Disfranchisement Laws.

Following its own well-settled precedent of applying the plain meaning of statutes where it is evident, this Court cannot reach the plain statement rule in this case. However, assuming that the plain statement rule applies,[7] the Ninth Circuit was correct in applying § 2 to Washington's felon disfranchisement statutes.

1. Covering Felon Disfranchisement Under § 2 Does Not Alter Impermissibly The Balance Between Federal And State Powers.

As noted above, if a statute is ambiguous and the proffered statutory interpretation alters the balance of federal and state powers, the Court must find a plain statement from Congress

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[7] Should this Court determine that the plain statement rule applies, it should permit the court below to conduct the analysis in the first instance.

that it intended this result. Assuming, *arguendo*, that § 2 is ambiguous, reading § 2 to cover felon disfranchisement statutes does not impermissibly alter the balance between state and federal powers and, indeed, requires no further shift in the balance of state and federal powers than that already sanctioned by Congress and this Court.

Congress and this Court have made clear that the VRA was enacted specifically for the purpose of enforcing and extending the protections of the Reconstruction Amendments. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997). Furthermore, it is well settled that these Reconstruction Amendments permissibly shift the balance of federal and state powers to remedy racial discrimination. By extension, the Voting Rights Act enjoys the same latitude shared by these amendments.

In *Chisom v. Roemer*, which was handed down the same day that the Court applied the plain statement rule in determining the application of the Age Discrimination and Employment Act to mandatory retirement laws enacted under the Commerce Clause,[8] this Court did not apply the plain statement rule. The omission of the plain statement rule from the Court's analysis in *Chisom*, a § 2 case, implies that the plain statement rule does not apply to legislation enforcing the Civil War Amendments despite their interference with state powers. Indeed, in his dissent in *Chisom*, Justice Scalia acknowledged that the plain statement rule should not apply in Section 2 cases. *Chisom*, 501 U.S. at 412 ("I am content to dispense with the 'plain statement' rule in the present cases . . . .") (citation omitted).

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[8]*Gregory v. Ashcroft*, 501 U.S. at 470.

2. The Legislative History Of §§ 2 And 4 Demonstrates Congress' Clear Intent Not To Exclude Felon Disfranchisement From The Reach Of § 2.

There is simply no evidence to suggest that Congress intended to exclude felon disfranchisement from § 2's reach. Nothing in the text or legislative history of § 2 provides an exception for felon disfranchisement (or any other voting practices that may result in discrimination on account of race). *See Chisom*, 501 U.S. at 392 ("Section 2 protect[s] the right to vote, and it d[oes] so without making any distinctions . . . ."). For the same reason that § 2's plain meaning precludes application of the plain statement rule, *see supra* pp. 13-16, Respondents submit that the text of the statute itself is evidence of Congress' intent that § 2 extend to all voting practices, including voting qualifications based on a felony conviction. Indeed, Congress intended § 2 to have nationwide coverage and to be construed broadly to include all qualifications, prerequisites, standards, practices or procedures that had the purpose or the effect of discriminating on account of race. *See, e.g., Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) ("The [Voting Rights] Act gives a broad interpretation to the right to vote . . . .").

Moreover, rules of statutory construction do not require Congress to provide a "laundry list" of statutory application. *Moskal v. United States*, 498 U.S. 103, 111 (1990) (applying plain meaning of statute, rejecting the contention that "every permissible application of a statute [must] be expressly referred to in its legislative history"); *see also Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. at 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119

(2001); *see also Chisom*, 501 U.S. at 396 (breadth of statutory language ["elect *representatives* of their choice"], absence of statutory language expressly excluding judges from coverage of section, and lack of any statements in legislative history regarding exclusion of judicial elections, together foreclose any interpretation of statute as not applying to judicial elections) (emphasis added).

To the extent that Congress expressly refers to felon disfranchisement in the text and legislative history of the VRA at all, the statutory language and legislative history demonstrate that when Congress intends to exclude felon disfranchisement from the coverage of the Act, it does so plainly. Specifically, § 4 of the Voting Rights Act,[9] in which Congress explicitly excluded felon disenfranchisement laws from the definition of "tests or devices," cannot be read also to exclude felon disfranchisement from the reach of § 2. The exclusion of felon disenfranchisement under § 4 does not authorize states to use felon disfranchisement as a mechanism to discriminate in voting. Such a result would be antithetical to the purposes of the Voting Rights Act that have been identified both in its legislative history and by this Court. Rather, the exception under § 4 allows states to adopt and implement felon disfranchisement laws only so long as these laws are not applied in a manner that is intentionally discriminatory or that results in discrimination, in which case the laws would fall within the purview of §2.

There is no canon of statutory construction that would support exporting the legislative intent behind one statutory provision to another. *See, e.g., Int'l Bhd. of Teamsters v.*

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[9] Section 4(a) and 4(b) of the VRA, 42 U.S.C. §§ 1973b(a), (b), establish criteria to identify jurisdictions within which literacy tests and other devices that had been used as prerequisites to voting may be suspended, and that also are subject to the preclearance requirements of § 5 of the Act, 42 U.S.C. § 1973c.

United States, 431 U.S. 324, 354 n.39 (1977) (holding that the legislative history of a statutory provision not at bar is "entitled to little if any weight"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."). Sections 2 and 4 are each substantively unique and neither their texts nor their legislative histories are interchangeable.[10]

C. Application Of § 2 Of The Voting Rights Act To Washington State's Felon Disfranchisement Scheme Is Entirely Consistent With This Court's Ruling In *Richardson v. Ramirez*.

Respondents' VRA challenge to Washington's felon disfranchisement scheme is neither precluded by, nor inconsistent with, this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). *Richardson* did not hold that felon disfranchisement laws could not be challenged under other provisions of federal and state law that do not directly conflict with § 2 of the Fourteenth Amendment of the United States Constitution. Instead, this Court left open the possibility for alternative challenges to felon disfranchisement, especially where there is evidence of discrimination. *See generally Hunter v. Underwood*, 471 U.S. 222 (1985).

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[10]As noted *supra* note 9, § 4 establishes criteria for identifying jurisdictions subject to the preclearance requirement of § 5. Those criteria have nothing to do with § 2. This Court has "consistently understood these sections [§§ 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (noting how the two sections 'differ in structure, purpose, and application') . . . . " *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. at 477.

In *Richardson*, this Court examined the particular question of whether the Equal Protection Clause of § 1 of the Fourteenth Amendment prohibited California's felon disfranchisement scheme in light of § 2 of the same Amendment, which appeared to sanction such laws. *Richardson*, 418 U.S. at 27. This Court held that § 2 of the Fourteenth Amendment permits states to exclude convicted felons from the franchise, notwithstanding § 1's requirement that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. *See Richardson*, 418 U.S. at 54. However, in *Hunter*, nearly a decade after deciding *Richardson*, this Court found that Alabama enacted its felon disfranchisement provision with discriminatory intent and, therefore, in violation of the Equal Protection Clause. The Court held that § 2's authorization of state disfranchisement laws did not permit purposeful discrimination. *Hunter*, 471 U.S. at 233. Thus, *Richardson* is not the last word on constitutional challenges to felon disfranchisement provisions.

Moreover, *Richardson* did not address the issue raised in this case: whether the Voting Rights Act can be used to challenge a state's felon disfranchisement laws that result in the denial of the right to vote on account of race or color. Accordingly, *Richardson* does not and, as a matter of *stare decisis*, cannot close the door on Respondents' challenge to Washington's felon disfranchisement laws.

Indeed, the VRA challenge to felon disfranchisement laws is substantively different than the challenge brought in *Richardson* because it seeks to address racially discriminatory criminal disfranchisement. Although in *Richardson* this Court held that states may deprive felons of the right to vote without necessarily violating the Fourteenth Amendment, *Richardson*, 418 U.S. at 54-55, "when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to

seek redress." *Farrakhan v. Washington*, 338 F.3d at 1016, App. 14a; *see also Wesley v. Collins*, 791 F.2d at 1259-61 (assuming without deciding that § 2 applied to Tennessee's felon disfranchisement statute before holding that the statute did not violate the VRA).

This is precisely what Respondents here seek to demonstrate — that Washington State's felon disfranchisement scheme constitutes an improper race-based vote denial in violation of § 2. This claim is simply not inconsistent with nor foreclosed by *Richardson*.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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